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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 100

WILLIAM A. DOSS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

PETITION FOR REHEARING.

A. M. FITZGERALD,
Counsel for Petitioner.

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PEOPLE OF THE STATE OF ILLINOIS.

PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now William A. Doss, petitioner, in the above entitled cause and presents this, his petition for a rehearing of the order and decision of this Court dated October 11th, 1943, denying the application of petitioner for the writ of certiorari upon the ground that said application was not filed "within the time provided by section 350 Title 28 U. S. C. A., 43 Stat. 940, etc.", and in support thereof respectfully shows:—

I.

The petition for rehearing in the Supreme Court of Illinois was disposed of on March 11th, 1943. The applica-

tion for certiorari was lodged with the Clerk of the Supreme Court of the United States prior to June 11th, 1943, costs were paid, printing completed and the complete transcript of record, together with the application for certiorari itself, were filed with the Clerk of this Court on June 11th, 1943. The printed copy forwarded by the Clerk to counsel for service contained and still contain, on the face thereof, the official file mark of the Clerk dated June 11, 1943. Service was promptly had upon opposing counsel and proof of service lodged with your Clerk within the ten days provided therefor.

We believe that the Clerk's records when examined will substantiate each of the foregoing statements and that it thus officially appears of record that our application for certiorari was actually and physically filed in exact compliance with the statute.

II.

Since the Clerk's record indisputably shows that our application for certiorari was filed within the period of three months provided by the statute, we are forced to assume that such application is denied through some judicial interpretation or construction of the statute. Since no opinion is filed, elucidating the assumed construction and interpretation of the statute, we have painstakingly examined the entire record and corresponded with the Clerk of this Court in an endeavor to discover the basis for the order of denial. The only possible basis which counsel can discover appears to be based upon the fact that the petition for rehearing seasonably lodged in the Supreme Court of Illinois, was on March 11th, 1943, "stricken as in violation of rules" rather than being dismissed or denied on its merits. We accordingly devote the remainder of this petition to a presentation of the authorities dealing with such subject matter.

(A) No decision of this Court, no text writer, no work on Federal Procedure, has been found after ex-

haustive research, which precisely or definitely supports the interpretation or construction which we now assume as the basis for the order of denial.

(B) The reported decisions are uniform to the effect that *finality of the judgment sought to be reviewed is the decisive factor and time element provided by the three months statute* now in question.

(C) The three months period specified in section 350 Title 28 U. S. C. A., 43 Stat. 940, commences to run from —— and does not commence to run until —— the date when such judgment becomes *FINAL.*

(D) Where a rehearing is permitted by Statute or rule of Court as a matter of right, (no leave or motion therefor being necessary) and the same is filed seasonably, taken under advisement, considered by the Court or entertained, then the decision or opinion (under date of January 21, 1943) does not become an appealable *JUDGMENT* until such rehearing is *disposed of.* (March 11, 1943)

Citizens Bank v. *Opperman,* 249 U. S. 448, 63 L. Ed. 701;

Andrews v. *Virginian Ry. Co.,* 248 U. S. 272, 63 L. Ed. 236;

Natl. Labor Rel. Bd. v. *Mackay Radio & T. Co.,* 304 U. S. 333, 82 L. Ed. 1381;

Chicago Gr. W. Ry. Co. v. *Basham,* 249 U. S. 164, 63 L. Ed. 534;

Morse v. *U. S.,* 270 U. S. 151, 70 L. Ed. 518;

U. S. v. *Seminole Nation,* 299 U. S. 417, 81 L. Ed. 316.

(E) The manner or nature of "such disposition" is immaterial. The sole question is—and has always been —*when* such rehearing is disposed of or *WHEN* the judgment of the lower Court became final, rather than how or why the rehearing was so disposed of.

Thomas Day v. *Doble Laboratories*, 41 Fed. (2d) 51, from which we briefly quote at page 52:

> "To have the effect of tolling the statutory limitation for appeals it is, of course, not essential that the petition for rehearing be well taken, and it would seem to follow that if it is defective in form or substance, and is denied for that reason it would still have such effect. True, if it is a mere sham it may be wholly ignored; but if, acting in good faith, a party files a petition which is ultimately held deficient because it does not meet some requirement of the rules in respect of either form or substance, it operates to postpone the finality of the decree until it is disposed of."

Andrews v. *Virginian Ry. Co.*, 248 U. S. 272, 63 L. Ed. 236, from which we quote as follows (at page 275):

> "It is true that under the law of Virginia in a case like this the power of the Court of Appeals to review the judgment of the trial Court was gracious or discretionary, and not imperative or obligatory, but the existence of the power, and not the considerations moving to its exercise is the criterion by which to determine whether the judgment of the trial Court was final at the time of its apparent date or became so only from the date of the happening of the condition,—the action of the Court of appeals,—which gave to that judgment its only possible character of finality for the purpose of review in this Court. Nor is the result thus stated a technical one, since it rests upon the broadest considerations inherent in our Constitutional system of Government, and material therefore to the exercise by this Court of its rigthful authority. That this is true would seem to be demonstrated by considering that if it were not so a judgment of a state court, susceptible of being reviewed by this Court, would, notwithstanding that duty be open at the same time to the power of a State Court to review and reverse, thus in substance depriv-

ing each Court of its powers and begetting the possibility of conflict and confusion."

Chicago Great W. R. Co. v. *Basham,* 249 U. S. 164, 63 L. Ed. 534, from which we briefly quote:

> "Section 237 Judicial Code permits of the review by this Court only of the final judgments of the highest State Court in which a decision in a suit could be had. It is only a judgment marking the conclusion of the course of litigation in the Courts of the State that is subject to our review. Hence whatever its form of finality, if a judgment be in fact subject to reconsideration and review by the State Court of last resort thru the medium of a petition for rehearing, and such a petition is presented to and entertained and considered by that Court, we must take it that by the practice prevailing in the State, the litigation is not brought to a conclusion until the petition is *disposed of* and until then the judgment previously rendered cannot be regarded as a final judgment within the meaning of the Act of Congress."

III.

To now interpret or construe the statute in the manner which we are forced to assume this Court has done would enable the highest Court of the respective States (Supreme Court of Illinois) to absolutely deny and prevent a review by certiorari in this Court, by merely holding the rehearing under advisement for three months before striking it from the files. The litigant can only patiently await the decision of the highest State Court and having so waited would find that his certiorari is impossible because of the manner, method, reasons for, or nature of disposition made of the petition for rehearing rather than being guided by the date or time of such disposition. (In Illinois when a rehearing is filed at the May term of our Supreme Court, disposition of such rehearings are not made until the convening of the

September term, and if at the September term the rehearing be stricken, then the litigant would never be permitted to avail himself of the statutory review by certiorari.)

IV.

Where a rehearing has been filed or motion for new trial made and pending such rehearing or motion litigant has applied for certiorari the Courts have uniformly dismissed the application for certiorari or appeal, as prematurely filed.

Chicago G. W. Ry. Co. v. *Basham,* 249 U. S. 164, 63 L. Ed. 534 ;

Shallas v. *U. S.,* 37 Fed. 2d, 692;

Rardin v. *Messick,* 78 Fed. 2d, 643.

V.

If our assumption be correct that this Court has denied certiorari because the rehearing was stricken instead of being denied, then such a new, important, and far reaching decision should become the subject of a full published opinion so that in the future the litigants and their attorneys may be informed, understand and be governed by such interpretation, construction, and decision. Counsel have made a careful, painstaking, thorough search and have been unable to find a single decision precisely supporting the ruling which we now assume this Court to have made.

VI.

We are aware of the many decisions to the effect that a rehearing or motion for new trial which is not filed within the proper time, or where a motion is made for leave to file and later leave is refused, or where a second, unauthorized motion or petition is filed and later denied, that such belated, unseasonable and unauthorized applications do not

toll the limitation period provided by statute. A review or citation of such authorities can be of no assistance in the instant case and are accordingly not here cited.

VII.

In Illinois a rehearing is not discretionary or matter of grace. All litigants may apply for a rehearing as a matter of right by giving notice within fifteen days after the opinion and by filing the petition for rehearing within twenty-five days after the opinion. (See Rule 44 Ill. Sup. Ct. printed in appendix hereto.)

It is apparent from the transcript now before this Court that the decision and opinion of the Illinois Supreme Court was rendered on January 21, 1943 (Tr. pp. 137-8); that the petition for rehearing was filed on February 15, 1943 (Tr. 139); that the order disposing of such rehearing was entered March 11, 1943 (Tr. 139), and that such order indicates that the petition for rehearing "was duly considered, and the Court being fully advised in the premises" did strike the same as in violation of rules.

By reference to the foregoing pages of the transcript it is demonstrated that the petitioner William A. Doss, carefully complied with the time element wherever required throughout the proceedings; that the rehearing in Illinois is a matter of right, was seasonably filed, entertained by the Court, and disposed of on March 11th, which is exactly three months prior to the present application for certiorari.

Conclusion.

Wherefore, upon the foregoing grounds it is respectfully urged that this petition for a rehearing be granted and that the order and judgment of this Court denying such application for certiorari as not made within the time provided by

law be upon further consideration reversed, and that such petition for certiorari so filed, be granted so that the cause may be considered upon its merits.

Respectfully submitted,

A. M. FITZGERALD,
Counsel for Petitioner.

I, Counsel for the above named William A. Doss, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

A. M. FITZGERALD,
Counsel for Petitioner, William A. Doss.

Subscribed and sworn to before me this 30th day of October, A. D. 1943.

NELLIE D. MICHAELS,
Notary Public.

[SEAL.]